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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

JOHN HARVEY GASKINS, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition For Writ Of Certiorari To The Colorado Supreme Court

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INTRODUCTION

John Harvey Gaskins was the defendant below and will be referred to by name. The State of Colorado was the prosecution below and will be referred to as the petitioner, the State or the prosecution.

STATEMENT OF THE CASE

On June 28, 1987, John Gaskins and another man, while intoxicated, attempted to steal a vending machine from a hotel in Denver. While apprehending Mr. Gaskins, a struggle ensued between Mr. Gaskins and a hotel employee. Mr. Gaskins was charged with second degree assault and attempted theft, in violation of C.R.S. §§ 18-2-101 and 18-4-401. Subsequently, the State added three counts of habitual criminal, pursuant to C.R.S. § 16-13-101. The prior convictions were a 1981 conviction for theft, and two 1976 convictions for second degree assault and attempted criminal trespass. Mr. Gaskins' motion to suppress his prior convictions was denied. He pled not guilty to the charges and a trial to the jury was held. Mr. Gaskins was acquitted of second degree assault and found guilty of third degree

assault, a misdemeanor, and attempted theft, a class five felony. After a separate proceeding following the trial, the jury returned verdicts of guilty on the three counts charging habitual criminal.

Prior to sentencing, Mr. Gaskins filed an "Objection to Imposition of Life Sentence" alleging that a mandatory life sentence under the circumstances of his case would constitute cruel and unusual punishment in violation of the United States and Colorado Constitutions. The trial court "noted" the objection but did not rule on it, and imposed a sentence of life as mandated by the statute. The statute further provided that Mr. Gaskins would not be eligible for parole for 40 calendar years.

Mr. Gaskins raised two issues on appeal to the Colorado court of appeals: (1) that the evidence was insufficient as a matter of law to sustain his conviction for attempted theft; and (2) that a life sentence in this case constituted cruel and unusual punishment under the Colorado and United States Constitutions.

The court of appeals issued an opinion affirming Mr. Gaskins' conviction but vacated his sentence and remanded the case back to the trial court for a proportionality hearing. *People v. Gaskins*, No. 88CA0159 (Colo. App. May 17, 1990). The Colorado supreme court granted the State's petition for writ of certiorari on the issue of whether the court of appeals should have remanded for a proportionality review. On January 13, 1992, the supreme court issued its opinion affirming the court of appeals' decision. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992).

The supreme court first noted that in Colorado a defendant is entitled to at least an "abbreviated" review of the proportionality of the sentence when challenging a life sentence under the Colorado habitual criminal statute. 825 P.2d at 34, *citing*, *Alvarez v. People*, 797 P.2d 37 (Colo. 1990), *People v. Drake*, 785 P.2d 1257 (Colo. 1990), and *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984). The court explained that

> "an abbreviated review itself simply consists of a scrutiny of the offenses in question to determine whether in combination they are so lacking in gravity or seriousness as to suggest that a life sentence is constitutionally disproportionate to the crime, taking

> into account the defendant's eligibility for parole. In the absence of an inference of disproportionality suggested by this review or by presentation of information by the defendant that calls into question whether the sentence is disproportionate to sentences imposed on other criminals in Colorado or other jurisdictions, the second and third factors in the Solem test need not be employed."

825 P.2d at 36.

The court went on to adhere to its previously stated position that in the vast majority of cases challenging habitual criminal sentences, consideration of the "triggering" offense and/or the prior felonies, with eligibility of parole, would establish justification for the life sentence and no other review would be necessary. 825 P.2d at 36 However the court recognized that there would be rare situations where consideration of the gravity of the offenses and a review of the available evidence would not be sufficient to determine the proportionality question and therefore a more refined analysis would be needed. 825 P.2d at 38.

After reviewing the available evidence in this case, which consisted of the transcript of the trial in this matter as well as all transcripts of Mr. Gaskins' prior pleas, the supreme court agreed with the court of appeals that Mr. Gaskins case was one of those rare cases in which further review was necessary. 825 P.2d at 38-39.[1] Although the State had argued throughout the case that Mr. Gaskins' second degree assault conviction was a crime of violence and therefor should automatically preclude him from proportionality review, the court had before it information which showed that the incident happened 16 years before, Mr. Gaskins was 19 years old at the time, he was highly intoxicated, and the grade of the offense was raised from a misdemeanor to a felony because it involved a police officer. Consequently the supreme court remanded the case for further development of the facts surrounding the offenses and for sentence comparisons if necessary.

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1. In fact, Mr. Gaskins' case is the first case where the supreme court has held that an "abbreviated" review was not sufficient to determine the constitutionality of the sentence.

The State filed a motion to stay issuance of the mandate in the Colorado supreme court in order to petition the United States Supreme Court for writ of certiorari. The court granted the stay for thirty days provided that all further stays be obtained from the Supreme Court. On March 10, 1992, Justice Byron White denied the State's application for stay. Consequently the mandate in this case issued on March 17, 1992, and jurisdiction over this case was returned to the trial court. The State filed a petition for writ of certiorari in the United States Supreme Court on May 4, 1992 and has also renewed its application for stay. The brief in opposition to this petition is currently due to be filed on June 3, 1992.

SUMMARY OF THE ARGUMENT

The State's position that the possibility of parole precludes proportionality review is not supported by the case law cited in the State's brief. While the possibility of parole should always be a factor in considering the proportionality of the sentence, it should not be the sole factor on which to base the constitutionality of a sentence.

In rendering its decision in *Gaskins*, the supreme court applied long-standing Colorado law which allows for proportionality review of life sentences imposed under the Colorado habitual criminal statute. Contrary to the State's dire predictions, it is highly unlikely that this opinion will open the floodgates of full proportionality reviews since the thrust of the court's opinion was that "abbreviated" reviews would be sufficient in the vast majority of cases and that only the rare case would be entitled to more than cursory review.

The State's argument that *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991), does not apply to recidivist cases and therefor certiorari is necessary ignores both the language of Harmelin and the realities of application of supreme court decisions. Although the Colorado supreme court chose to apply its pre-*Harmelin* case law because of what it perceived to be the absence of definitive guidelines, its own proportionality review process is really not that much different than the *Harmelin* plurality's suggested review process. It is logical to presume that

most states will apply and interpret *Harmelin* in all situations where an argument is made that the sentence is disproportionate regardless of whether the case involves a recidivist statute or not.

ARGUMENT

I. THE PERCEIVED CONFLICTS BETWEEN THE *GASKINS*' DECISION AND OTHER FEDERAL AND STATE DECISIONS DOES NOT WARRANT THE GRANTING OF CERTIORARI BY THIS COURT.

a. The provision in the Colorado habitual criminal statute allowing for parole eligibility after 40 years does not automatically preclude the right to full proportionality review.

The State argues that this Court should grant its petition for writ of certiorari because the Colorado Supreme Court's decision in this case conflicts with other state and federal courts which have held that "the possibility of parole obviates the need for full proportionality reviews." (Petition, p14) Of the cases cited by the State, only one, *State v. Wilson*, 687 P.2d 720 (Tenn. Crim. App. 1984), actually holds that the presence of parole obviates the necessity of a full proportionality review. However another division of that court, in determining a defendant's constitutional attack on his life sentence under the Tennessee recidivist statute, considered, in addition to the possibility of parole, that Tennessee put limits on the types of crimes that could support and trigger the recidivist statute, that Tennessee required more prior felonies than other states, that the defendant had previously been convicted of six felonies all of them burglaries or burglary-related crimes, and that the fact that defendant had committed seven burglary-type crimes in six years supported the inference that he was a professional burglar who was not fit for rehabilitation. *See*, *State v. Freeman*, 669 S.W.2d 688 (Tenn. Crim. App. 1983).

In the other cases cited by the State, the courts engaged in either modified or full *Solem v. Helm*, 463 U.S. 277 (1983), analysis, depending on the facts of the case, despite the presence of the possibility of parole. For example, in *Moreno v. Estelle*, 717 P.2d 171 (5th

Cir. 1983) the court stated that it was applying *Rummel v. Estelle*, 445 U.S. 263 (1980) rather than *Solem v. Helm* on the grounds that the case before it was factually indistinguishable. However the court then analyzed how soon defendant would be eligible for parole in comparison to the defendant in *Rummel* and considered the fact that defendant's third conviction, the triggering offense, was aggravated assault with a deadly weapon. Despite the fact that the court claimed to be engaging in no review, it is clear from its actions that it was performing a modified *Solem* review. In both *United States v. Rosenberg*, 806 F.2d 1169 (3rd Cir. 1986) and *Chandler v. Jones*, 813 F.2d 773 (6th Cir. 1987) the courts specifically determined that the defendants were entitled to proportionality review of their sentences under *Solem v. Helm*. The *Rosenberg* court upheld the defendant's sentence after consideration of the first *Solem* factor when it determined that a comparison of the crimes committed (possession of unregistered firearms, carrying explosives during the commission of a felony, possession of false documents and conspiracy) and the sentence received (58 years) demonstrated that the sentence was appropriate and constitutional. The *Chandler* court also upheld the defendant's sentence under the Tennessee recidivist statute but it did so after a full *Solem v. Helm* review.

Here the Colorado supreme court applied long-standing Colorado law that defendants sentenced under the Colorado recidivist statute were entitled to proportionality review of those sentences under *Solem v. Helm*. The court reiterated that most reviews would be "abbreviated," accomplished by comparing the sentence with crimes of convictions with additional consideration of the eligibility of parole. However the court recognized that sometimes this abbreviated review would not answer the question of constitutionality and therefore a more extended review would be necessary which might include an evaluation of the relevant facts and a comparison of sentences. Far from being in conflict with other courts, the procedures used by Colorado are, to a large extent, the same type of procedures used by most other courts.

b. The Colorado Supreme Court reaffirmed its position that a full proportionality review is rarely necessary and that most cases will be resolved under an "abbreviated" review process.

The State argues that certiorari should be granted in this case because it will be put under a tremendous burden of having to conduct "many unnecessary full proportionality reviews" in this and future constitutional challenges to life sentences under the recidivist statute. (Petition p16) Although the defense truly wishes this were the case, the fact is that the *Gaskins* opinion reaffirms that full proportionality reviews will be conducted in very few, if any, other cases. Furthermore since the supreme court applied established Colorado law in upholding this remand it is difficult to see how the State was harmed or surprised.

In *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984), the Colorado Supreme Court held that a defendant is entitled to a proportionality review of a life sentence when sentenced to life under the Colorado recidivist statute. In upholding the defendant's sentence, the court determined that the gravity of the offenses, underlying and priors, plus the possibility of parole after 20 years justified the sentence. The court reaffirmed the *Hernandez* "abbreviated review" process in affirming sentences in *People v. Drake*, 785 P.2d 1257 (Colo. 1990) and in *Alvarez v. People*, 797 P.2d 37 (Colo. 1990). In *Gaskins* the supreme court noted "[t]he rule to be gleaned from Alvarez, Drake, and Hernandez is that only an abbreviated review is necessary when the crimes supporting a habitual criminal sentence include grave or serious offenses and when the defendant will become eligible for parole, albeit not for 40 years." *Gaskins*, 825 P.2d at 36. The court also noted that it "presumed" that "the overwhelming majority of prosecutorial charging decisions are made with sensitivity to the seriousness and extent of a defendant's criminal record...." *Gaskins*, n. 11

However in none of its prior decisions did the court hold that this was all the review a defendant was entitled to and indeed repeatedly stated that it was bound by this Court's decision in *Solem v. Helm*. Consequently the State was on notice that a full proportionality review would need to be conducted when the gravity of the offenses, with consideration of parole, did not support a life sentence. That is the case here.

The State additionally argues that any hearing would be meaningless because Mr. Gaskins deserves the sentence he received and it will be impossible to obtain statistical evidence of any value. Rather than negate the need for a hearing this argument reinforces the correctness of the state appellate courts' decisions.

The trial court rejected Mr. Gaskins' request for a hearing and the appellate courts determined that there was insufficient information to make any decision regarding the constitutionality of this sentence. Therefore there has been no decision by a court, after a full review of the relevant information, that Mr. Gaskins is a person who deserves a life sentence. Additionally, although the State has asserted throughout this case that the available evidence establishes that Mr. Gaskins is deserving of this sentence, the defense has maintained that the available evidence shows that this sentence is constitutionally disproportionate. In short this is a disputed issue that needs to be resolved by a trial court after a hearing with the presentation of evidence and argument of counsel.

It is unknown at this time how difficult it will be for the State to produce statistics regarding sentences in Colorado since they have never, to counsel's knowledge, done so before. Nor can the unreliability of the statistics be argued since again they have never been produced. It is disingenuous for the State to argue that it cannot produce reliable statistics when it actually has no idea what it can or cannot produce and has no idea what the trial court will order it to produce.

The State has known for eight years, since the issuance of *Hernandez*, that a proportionality review is mandated under the Colorado recidivist statute. The lack of reliable data and the burden of producing that data should not now be used as an excuse to deprive a defendant of his constitutional rights solely because the State has chosen to ignore the holdings of the state supreme court.

c. The court applied long-standing legal principles in upholding a remand for additional factual findings.

The State argues that the Colorado supreme court established dangerous precedent in upholding the court of appeals' remand for additional factual findings. In fact, the supreme court merely applied long standing and traditional legal principles in its decision.

First the supreme court did not hold that full proportionality reviews were warranted unless a comparison of the crime and sentence indicated "no abuse of discretion." (State's Petition, p14) What the court held was that when reviewing a lower court's order of remand it was required to uphold that order unless it found that there was an abuse of discretion. In fact, the supreme court intimated that if the court of appeals had not ordered the remand, that would not have been an abuse of discretion. n.16.

Furthermore, it is traditionally a trial court's duty to develop the facts of a case not the appellate court's. It must be remembered that this trial court was given an opportunity to develop the facts and hear arguments on the proportionality issue but refused to do so. The supreme court reiterated that the trial court had broad discretion in determining the scope and character of the evidence that is presented in a proportionality hearing and "should exercise its discretion to control evidentiary presentations to serve the dual goals of obtaining adequate information to assure an informed decision and conserving judicial resources by curtailing presentation of unnecessarily extensive evidence." *Gaskins*, n.13. Consequently, the State will not be put to a greater burden than it can bear.

II. THE CONSTITUTIONAL STANDARDS REAFFIRMED IN *HARMELIN* WILL PROVIDE SUFFICIENT GUIDANCE TO THE STATE AND FEDERAL COURTS TO DETERMINE ISSUES REGARDING THE CONSTITUTIONALITY OF SENTENCES UNDER RECIDIVIST STATUTES.

The State argues that this Court should grant the writ of certiorari because this Court has not addressed the issue of life sentences under recidivist statutes for nine years. In making this argument the State disregards the impact that *Harmelin* will have on courts' evaluation of life sentences under recidivist statutes and the manner in which lower courts implement Supreme Court decisions.

Although the Colorado supreme court stated that it could find no clear guidance from the *Harmelin* decision and would therefore apply its pre-*Harmelin* interpretation of *Solem v. Helm*, the fact remains that the Colorado approach to proportionality review is not that much different than the plurality's "one step at a time" *Solem* interpretation. Indeed the Colorado supreme court noted, as did the *Harmelin* plurality opinion, that most proportionality attacks will be resolved by comparing the offense (and with a recidivist statute this would include the priors) with the sentence.

The primary impact of the *Harmelin* decision is that it reaffirms the validity and vitality of the Eighth Amendment and *Solem v. Helm*. That alone will answer the majority of state courts' questions in the area of proportionality review regardless of whether it involves mandatory or lengthy sentences under recidivist statutes or for a single crime.

CONCLUSION

Because the Colorado supreme court applied existing Colorado law in upholding the remand and because the court's decision conforms with constitutional principles as stated by this Court, the State's petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I certify that a copy of this foregoing Brief in Opposition to Petition for Writ of Certiorari was served on Gale Norton, Colorado Attorney General, and Robert Russel, Assistant Attorney General, by hand delivery, 110 Sixteenth Street, 10th Floor, Denver, Colorado, 80202, on June 3, 1992.

Thomas M Van Cleave III